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January 6, 2005

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JAN - 6 2005

Federal Communications Commission
Office of Secretary

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: ***In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) Pertaining to Qwest's xDSL Services WC Docket No. 04-416***

Dear Ms. Dortch:

On behalf of the Federation of Internet Solution Providers of the Americas ("FISPA"), transmitted herewith are an original plus four (4) Public copies of its Opposition in the above-captioned proceeding, marked as **"REDACTED – PUBLIC COPY."** The Public copy of this Opposition has also been filed electronically, via the Commission's Electronic Comment Filing System. Also enclosed is one (1) confidential copy, marked as **"NON-REDACTED – NOT AVAILABLE FOR PUBLIC INSPECTION,"** pursuant to the Protective Order issued in this proceeding.

An additional copy of this filing is enclosed, to be date-stamped and returned in the envelope provided.

Should there be any questions regarding this filing, kindly contact the undersigned.

Respectfully submitted,

Jonathan S. Marashlian

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JAN - 6 2005

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	
Forbearance Pursuant to 47 U.S.C. §160(c)	)	WC Docket No. 04-416
Pertaining to Qwest's xDSL Services	)	

OPPOSITION OF THE FEDERATION OF INTERNET SOLUTION PROVIDERS OF THE AMERICAS

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Dated: January 6, 2005

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EXECUTIVE SUMMARY

The Federation of Internet Solution Providers of the Americas ("FISPA") is a non-profit trade association of nearly 200 independent Internet Service Providers that use and rely on the DSL facilities of the "Baby Bells" or "RBOCs" to provide their services to the public. Forbearance from applying dominant carrier tariff regulations, rate averaging, and the requirement to resell at an avoided cost discount to Qwest's continued provisioning of DSL facilities to mass market customers and, instead, allowing Qwest to use private carriage agreements for these customers will not serve the public interest.

The Commission's duties under the Act are clear and unequivocal. Those duties, first and foremost, are to ensure that providers of telecommunications services are to do so in a non-discriminatory manner and at reasonable rates. This duty arises under both Title II and Title I of the Act. At its most basic level, Qwest's Petition seeks the freedom to act in a discriminatory and unreasonable manner. Therefore, grant of the Petition would do violence to the most fundamental duties entrusted to the Commission by Congress under either Title.

The regulatory regime under which Qwest must currently offer mass market DSL services is founded on the same principles, refined and focused on the specific problems created by the conflicting roles Qwest and the other Baby Bells have in the industry as the sole source providers of the access tools required by their competitors to reach end user customers. Today's regulatory regime effects the delicate and difficult balance of competing interests by requirements that are designed to neutralize some of the advantages the incumbent local carriers have by virtue of their bottleneck control over the local exchange networks and, in particular, DSL lines.

In place of these basic pro-competitive requirements, the heart of Qwest's Petition seeks relief from the duties to be reasonable and nondiscriminatory, in turn by ridding itself of prior notice requirements, and eradicating resale. In place of these obligations, Qwest seeks the right to substitute private carriage agreements with end user customers, while requiring its ISP competitors to adhere to the tarffing process.

FISPA's Opposition to forbearance is based on irrefutable facts, well-established legal precedents and principles and overriding public interests. FISPA's Opposition rebuts Qwest's self-serving claims that today's market environment allows lifting of safeguards intended to ensure Qwest acts reasonably and non-discriminatorily in the mass market for broadband services. Ironically, most of FISPA's rebuttal is based on Qwest's own assertions and exhibits.

For example, the "empirical" data Qwest uses to justify its claims is inadequate and does not rise to the level of proof required for forbearance. Qwest relies on the statement of one employee relating a single experience in one Qwest state in one Qwest city - Omaha, Nebraska. But all this shows is an offer by a cable company to a small neighborhood. And while Qwest claims this proves its ability to compete against cable is hampered because it is regulated and cable is not is a leap far too broad to be credible. One isolated incident is not proof of Qwest's claim that it is being harmed by its having to operate under the selected Title II requirements.

Qwest also offers a study and claims it shows that customers for broadband services are influenced by the price for such service. Such an economic truism is not proof sufficient to demonstrate that the broadband market in its 14-state region has reached the level of competitiveness that justifies forbearance under Section 10 of the Act.

It is clear that Qwest's "facts" and statistics are make weight and in no way relate to its ability to compete. Indeed, in granting the Petition, the Commission would be foisting on the public a service provider more consumed with ridding itself of regulatory requirements than providing quality and fairly priced services; this much is evident in Qwest's own data.

Qwest's arguments are not only based on dated statistics (over a year old); but the validity of Qwest's data is suspect, if not outright meaningless and contradictory to logic. Qwest argues, for example, that it needs to be relieved of its duty to average its rates. The argument is that, if relieved of this requirement, Qwest could offer lower rates to customers located in larger, low-cost markets than the rates it now offers to customers in high-cost markets. Qwest must not realize that this argument, if accepted, would have the Commission abet Qwest's intent to widen the digital divide that already exists in its 14-state territory? A divide the Commission and Congress pledged to eliminate throughout the nation as soon as possible.

While bemoaning its regulated position vis-à-vis cable modem providers, Qwest is totally silent on how the Commission, the public and its competitors can be assured that, once released from the duties to be reasonable and nondiscriminatory, it will not cross-subsidize its broadband services with its still dominant monopoly revenues derived from its lock on local exchange services, enhanced by its bundling of long distance services. Qwest's petition is not only lacking in the type of proof needed to justify the extraordinary remedy of forbearance, it is also disingenuous, a fact that should alert the Commission to Qwest's true intentions – to use "regulatory freedom" to engage in anti-competitive conduct.

Qwest makes much of the fact that tariffed services offered to ISPs are not part of its request. Qwest overstates its position by claiming it cannot use contract tariffs. This is untrue. Commission rules specifically allow price cap carriers to use contract tariffs. *See* 47 C.F.R Subpart H, Sections 69.701 *et seq*. More importantly, Qwest has the shoe on the wrong foot. Qwest's ability to offer contract tariffs to end users - residences, but more than likely small (and medium) sized businesses - can be used against independent ISPs. Qwest can use its private contracts with end users to offer its own ISP services and eliminate the ISPs as viable competitors.

Given these considerations, Qwest's Petition does not satisfy any of the Section 10(a) forbearance criteria. Therefore, a grant of Qwest's request may not be made. Qwest's Petition has failed to demonstrate that dominant carrier tariff regulations, rate averaging, and avoided cost resale are not necessary to ensure that the charges and practices for broadband services are just and reasonable and are not unjustly or unreasonably discriminatory; are not necessary for the protection of consumers; or are not necessary to protect the public interest. In addition, Qwest has not shown that forbearance will promote competitive market conditions and enhance competition among providers of telecommunications services. If any one of these criteria is missing, forbearance is not lawful.

Qwest's Petition is a textbook example of how not to justify lifting statutory protections of the public's interests. A decision to forbear from enforcing statutes or regulations is not a simple decision. It must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met; it must contain detailed evidence concerning the markets for the specific services at issue that is supported by empirical evidence. No such empirical evidence accompanies the Petition. On the contrary, the "evidence" Qwest submitted undercuts its own case and demonstrates that the decision the Commission must make is contrary to Qwest's request.

Stripped of all the pseudo arguments, self-serving rationalizations and bogus "facts," Qwest simply does not want its broadband activities encumbered with the duty to be reasonable or be restrained in the slightest from playing favorites among those it allows to make use of its DSL facilities, *i.e.*, Qwest itself.

In other contexts, the Commission has made the connection between *consumer choice* and *competitive forces*. A grant of forbearance here would deny consumer's their choice of service providers and the variety of services that only a diverse and abundant source of alternative providers can offer. In today's demonstrably uncompetitive marketplace for alternative broadband access supply, the requested forbearance will leave consumers with nothing to select from but what Qwest chooses to offer. This does violence to the central theme of the Communications Act that was embodied in the Act since its adoption 70 years ago. Section 151 of the Act provides that –

> … the purpose of regulating interstate and foreign commerce in communications [is] to make available, <u>so far as possible, to all people</u> of the United States, <u>without discrimination</u> … a rapid, efficient … wire and radio communication service with adequate facilities <u>at reasonable charges</u> … 47 U.S.C. §151 (emphasis added).

The expressed intent of Congress in enacting the 1996 Act is the same. It is the clear duty of this Commission to ensure reasonable and non-discriminatory communications services when provided by common carriers under Title II or by any provider under Title I. The Commission's duty is to adopt and enforce policies that provides to all the people, so far as possible, nondiscriminatory services with adequate facilities at reasonable rates.

The forbearance Qwest seeks will have a profound adverse impact on small and medium sized entrepreneurial businesses in an industry enmeshed in this country's telecommunications culture. The continued existence of independent ISPs, and the diversity of choices to the public rest on their ability to continue to have access to the network facilities necessary to deliver their services. While Qwest's Petition does not directly and blatantly seek to exclude independent ISPs from the market, grant of the Petition will ultimately have this effect.

Qwest also attempts to circumvent the requirements of section 10(a), by relying on section 706 in support of forbearance. Qwest argues section 706 establishes a duty under which the Commission must remove barriers to infrastructure investment in order to promote broadband competition. But the argument that forbearance from regulation would serve the goals of section 706 is nothing new. It is the same old "carrot" the Baby Bells have trotted out for many years. Just give us freedom from regulation and we will wire the world, solve the digital divide, provide free service and products to the communications disadvantaged. Empty promises and hollow bribes of benefits will not meet the three prong test of section 10(a). Those three prongs are conjunctive. Thus, even if the Commission were to consider that Qwest's section 706 promises lent some support to a public interest claim under section 10(a)(3), that is insufficient because, standing alone, it fails to satisfy the requirements of sections 10(a)(1) and 10(a)(2).

Finally, Qwest's petition is fatally flawed because it does not mention, much less address, the interests protected by the Regulatory Flexibility Act ("RFA"). The RFA requires each federal agency to conduct a regulatory flexibility analysis of the impact of its actions on small businesses and places the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete.

In 1996, Congress strengthened the RFA and provided for judicial review of agency compliance with the law. Now, agency actions or inactions are directly challengeable in court. As the many declarations submitted herewith demonstrate, the ISPs' very survival depends on access from the ILECs. The Commission cannot ignore or overturn established policy designed in large part to protect these small ISPs unless it does so on a reasoned basis that rests on an adequate record and is clearly and convincingly explained by the Commission.

A proper RFA analysis dooms Qwest's Petition. Forbearance will drive these small businesses out of the market. The effect, therefore, of a grant of the Petition cannot meet a major express goal of the RFA, *viz.*, to provide regulatory relief to small entities.

Before the
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In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	
Forbearance Pursuant to 47 U.S.C. §160(c)	)	WC Docket No. 04-416
Pertaining to Qwest's xDSL Services	)	

OPPOSITION OF THE FEDERATION OF INTERNET SOLUTION PROVIDERS OF THE AMERICAS

The Federation of Internet Solution Providers of the Americas ("FISPA"), by its attorneys, hereby submits its Opposition to the November 10, 2004, Petition for Forbearance filed by Qwest Corporation ("Petition").[1]

STATEMENT OF INTEREST

FISPA was founded in May, 1996 to represent the interests of Internet Solution Providers. Our members are called "SOLUTION" providers because they provide a range of services including Internet Access, Web Hosting, Web Design and an ever-increasing number of other services that use the Internet to facilitate a "solution." FISPA offers its members education, a place to network, and to facilitate discussion and technological development. We work to educate the public about the importance of the Internet industry. We support quality standards and practices for Internet Solution Providers. We create a single voice representing the concerns of the Internet industry.

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[1] *Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. §160(c) Pertaining to Qwest's xDSL Services,* WC Docket No. 04-416 (Nov. 10, 2004).

FISPA represents the interests of nearly 200 companies. Each offers a broad and unique range of Internet solutions, technologies, and information services to consumers across a wide swath of America.

FISPA members and other independent ISPs have long been the engine hidden beneath the hood of the car driving the Internet and broadband revolutions. Recent telecommunications and information technology policy decisions, rulemakings, and incumbent Bell Company ("RBOC") filings which tend to diminish the value and seek to further limit and even exclude the role that small, independent ISPs play in the future of the Internet, broadband services, and information technology, have awakened FISPA's members. Qwest's Petition is but the latest example of an agenda that began in 1987 with the first Triennial Review of the Modified Final Judgment ("MFJ"),[2] an agenda whose goal is anti-competitive, anti-small business, anti-consumer and, now, anti-independent broadband provider. Qwest's Petition, like other recent filings,[3] has driven FISPA's members to take action.[4]

FISPA and its members oppose Qwest's Petition and request the Commission deny it.

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[2] In 1987, a scant three years after AT&T's Divestiture of the Baby Bells, *see United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 224 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), the U.S. Department of Justice issued its first triennial review of the state of competition post-divestiture. *See* Peter W. Huber, The Geodesic Network, *1987 Report on Competition in the Telephone Industry*, United States Department of Justice, 1987. Incredibly, Huber's Report concluded that all telecommunications markets affected by the monopoly control of the Baby Bells were sufficiently competitive to warrant lifting MFJ restrictions and all the Bells to compete where they willed. This was 1987 when the average long distance call still cost around $0.25/minute and the commercial Internet was a decade away from its boom! Common sense, wisdom and trust in competitive markets over monopoly-driven agendas ultimately prevailed, ensuring that Huber's Report would not have its author's desired effect. The Baby Bells continue to press for re-monopolization of telecommunications markets to this day. FISPA implores the current Commission to exercise sound judgment and the foresight of its predecessors as it considers BellSouth's most recent push down this path of competitive destruction.

[3] *Petition of BellSouth Telecommunications Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Title II Common Carriage Requirements* (filed Oct. 27, 2004), Public Notice, WC Docket No. 04-405, DA 04-3507, rel. Nov. 3, 2004 ("BellSouth's Petition")

[4] FISPA recently filed an Opposition to BellSouth's Petition, hereinafter referred to as *BellSouth Opposition*.

I. QWEST'S PETITION CLEVERLY MASKS ITS TRUE INTENTIONS, BUT THE COMMISSION SHOULD NOT BE SO EASILY MISLED.

Unlike the Petitions filed by its Baby Bell counterparts,[5] that, on their face, seek broad relief from Title II and *Computer Inquiry* rules, Qwest seemingly requests only targeted and limited regulatory relief. In particular, Qwest asks the Commission to forbear from applying dominant carrier tariff regulations, rate averaging, and the requirement to resell at an avoided cost discount.[6] Qwest's request is also seemingly limited to its mass market xDSL services, which Qwest defines as "service of a type that is normally associated with residential and small business end users." Qwest also takes strides to put independent ISPs at ease with its forbearance request by implying that their ability to obtain the transmission facilities needed to serve their customers will not be affected in the slightest.[7] But make no mistake; granting Qwest's Petition will harm the ability of independent ISPs to compete for broadband customers and is the first step down a slippery slope that will ultimately have a devastating impact on independent ISPs, the public interest and the future of the Internet and technological development.

Qwest comes before the Commission seeking what it describes as expedited regulatory relief in "narrow" pricing areas.[8] However, Qwest's true intentions cannot be disguised, for they mirror the intentions of her sister RBOCs. Qwest admits as much when it declares: "Qwest

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[5] *See BellSouth Petition*; *see also Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Their Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004); *In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29 (filed Feb. 5, 2004).

[6] The specific tariffing rules and regulations Qwest seeks relief from are found at 47 U.S.C. Section 204, 47 C.F.R. Part 65, 47 C.F.R. §§61.38-61.49, and 61.58 to 61.59. *See* Qwest Petition at 13. The rate averaging requirement is found at 47 C.F.R. §69.3(e)(7). *See* Qwest Petition at 20. Qwest's duty to offer xDSL at an avoided cost discount under Sections 251(c) and 271 of the Act. See Qwest Petition at 23.

[7] *See* Qwest Petition at 3, note 13 ("DSL Host service is not a subject of this petition"); *see also* Qwest Petition at 3-4 ("an end user without Qwest telephone service can buy "naked DSL"); see also Qwest Petition at 4 ("In addition, Qwest sells "bulk" DSL service to ISPs such as Earthlink and AOL pursuant to tariff).

[8] Qwest Petition at 3.

supports and joins in BellSouth's recently-filed forbearance petition."[9] Reading between the lines of its carefully crafted Petition, it becomes clear that Qwest can and will use any narrow relief granted by the Commission to realize the same broad, long-term anti-competitive goals overtly sought by her sister RBOCs. Why else would Qwest request relief from contract tariff prohibitions[10] if its only goal is to better serve "mass market" consumers? Contract tariffing has never been used to serve this market set because contract tariffing is not necessary. Indeed, individually negotiating contract tariffs with mass market consumers is likely to increase Qwest's cost of doing business. The only conceivable reason Qwest would request such relief is because, once granted, Qwest will be authorized to negotiate private carriage agreements with <u>ALL</u> customers – including unaffiliated ISPs, as well as its own affiliates, to whom it might offer preferential treatment. Qwest then will have no incentive to maintain the current wholesale DSL offerings it claims are unaffected by its Petition, or at least to maintain them at levels that would be attractive to an unaffiliated ISP.

Qwest argues that forbearance will benefit the public in that without the tariffing and avoided cost resale requirements it will be able to tailor its services, enter into private contractual agreements, and take other actions in order to meet competitive pressures imposed by cable companies. But regulatory forbearance has not been adequately justified, nor is it the only means by which Qwest can compete with cable for broadband customers. Perhaps Qwest should develop a superior technology or use the pricing flexibility and promotional incentives that are readily available under existing regulations. Regulatory forbearance should be used as a last resort and then, only if the case for forbearance is supported by irrefutable facts and evidence. Qwest has not done so here, nor can it.

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[9] *Id.* at 2.

[10] Qwest overstates its position by claiming it cannot use contract tariffs. This is untrue. Commission rules specifically allow price cap carriers to use contract tariffs. *See* 47 C.F.R Subpart H, Sections 69.701 *et seq.*

Qwest's claim that it needs to be freed from dominant carrier tariff obligations in order to craft more tailored services on behalf of its customers is disingenuous and so blatantly fallacious that it mocks the regulatory expertise of the Commission. Qwest's ability to tailor its offerings is in no way diminished by the presence of competitors in the marketplace. Such competition, if anything, only goads a reluctant monopolist to respond to its customer's demands, something it need not do and has not done when heretofore left unchallenged by such competitive forces.

A premature grant of the requested forbearance will quickly lead to the evisceration of Title II common carrier requirements, which soon will be replaced by a private carriage regime. As the Commission is aware, private carriage arrangements can only be effected by negotiated contracts. Absent regulatory mandates such as avoided cost resale, however, Qwest has no incentive to fairly negotiate private contractual arrangements – not with end users and especially not with its competitors. If the Petition is granted, Qwest will have the upper hand and ability to force unfavorable private carriage arrangements and contracts of adhesion onto the public and ISP customers.

Qwest fashions its Petition under the guise of "mass market" regulatory relief, but FISPA has no doubt Qwest will use any relief obtained to squash competition in all markets. The Petition must be denied.

II. QWEST'S PETITION DOES NOT SATISFY ANY OF THE SECTION 10(a) FORBEARANCE CRITERIA - IT MUST BE DENIED.

The Commission may not grant Qwest's request for forbearance unless it is convinced that Qwest has satisfied the explicit forbearance requirements set forth in section 10(a) of the Communications Act. In particular, Qwest must demonstrate that the dominant carrier tariff regulations, rate averaging and resale of its mass-market xDSL services: (1) are not necessary to ensure that the charges and practices for its DSL services "are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) are not necessary "for the protection of consumers;" and (3) are not necessary to protect the public interest,[11] and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[12] If "any one of the three prongs is unsatisfied" the Commission must deny Qwest's Petition.[13]

In considering Qwest's Petition, the Commission must adhere to the principle that "[t]he decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met."[14] Because these criteria focus on competition and consumer protection, both the Commission and the courts have recognized that the Commission must examine detailed evidence concerning the markets for the specific services at issue. In particular, a request that seeks "the forbearance of dominant carrier regulation under Section 10" demands "a painstaking analysis of market conditions" supported by empirical evidence.[15] The Commission cannot simply "assume that, absent the regulation at issue, market conditions or any other factor will adequately ensure that charges … are just and reasonable and are not unjustly or unreasonably

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[11] 47 U.S.C. § 160(a).
[12] 47 U.S.C. §160(b).
[13] *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003); The Commission "cannot forbear in the absence of a record that will permit [it] to determine that each of the tests set forth in Section 10 is satisfied for a specific statutory or regulatory provision;" *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd. 17414, ¶ 13 (2000) ("*Fixed Wireless Forbearance Order*") (internal citations omitted); *see also, In the Matter of Amendment of the Commission's Rules Concerning Maritime Communications*, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd. 19853, ¶ 55 (1998) (request for forbearance from Title II common carrier obligations "cannot be granted because it is too vague, both as to the specific provisions from which we should forbear from enforcing, and as to why forbearance would be in the public interest").
[14] *PCIA's Broadband PCS Alliance's Petition for Forbearance for Broadband Personal Communications Services* ,Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 113 (1998).
[15] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp. v. FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001).

discriminatory."[16] There must be hard market data that unequivocally supports the drastic result of forbearance.[17] Section 10(a) analysis cannot be applied in the abstract, but must focus on the specific market conditions existing with respect to the regulations and service at issue.

As set forth below, Qwest's evidence does not provide the required factual and legal basis for forbearance and thus fails to meet the statutory requirements of Section 10.

A. QWEST DOES NOT SHOW THAT, ABSENT REGULATION, ITS WHOLESALE DSL RATES WILL BE "JUST AND REASONABLE" AND IT WILL NOT ENGAGE IN "UNREASONABLE AND DISCRIMINATORY" PRACTICES.

In order to satisfy the first prong of the three-part forbearance analysis, Qwest must make a *prima facie* showing that sufficient competition exists so that the tariff regulation, rate averaging requirements and resale regulations are not necessary to ensure that Qwest's rates and practices for its wholesale DSL services are just, reasonable, and not unreasonably discriminatory.[18]

Forbearance is rarely granted and should not be done so here. The Petition lacks the necessary credible evidence that provides any assurance of just and reasonable rates and does not explain how unjust and unreasonable discrimination will not occur. The Petition is also completely devoid of any explanation of how retail pricing flexibility will impact the wholesale DSL market. Determining whether incumbent LECs continue to possess market power over

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[16] Report and Order, Fifth Memorandum Opinion and Order, *1998 Biennial Regulatory Review – Review of ARMIS Reporting Requirements,* 14 FCC Rcd. 11443, ¶ 32 (1999).
[17] *See Petition of US West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in Phoenix, Arizona MSA,* Memorandum Opinion and Order, 14 FCC Rcd. 19947 ¶ 25 (1999) ("*Special Access Forbearance Order"), reversed and remanded on other grounds, AT&T v. FCC,* 236 F.3d 729 (D.C.Cir. 2001). *Fixed Wireless Forbearance Order*, (the Commission rejected forbearance because "[t]he BOC petitioners must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and this Commission has a meaningful opportunity to evaluate, the BOC petitioners' claims."
[18] *Special Access Forbearance Order* ¶ 32.

access is a highly fact-specific inquiry.[19] Qwest has not adequately shown that existing marketplace forces are sufficient to constrain its market power and ensure that both its retail and wholesale rates and practices are just, reasonable, and not unreasonably discriminatory. Therefore, Qwest's Petition fails to meet its burden of providing sufficient evidence to satisfy section 10(a).

1. While Qwest and Cable are Equal Partners in the Broadband Duopoly They are Completely Different Animals and Should Be Treated as Such.

Despite its cries to the contrary, Qwest has considerable market power in both the retail and wholesale markets. Indeed, what the below statistics indisputably show is that incumbent LECs, such as Qwest, are now nearing equal partners with cable in broadband market share.

In 2004, for the first time, more Internet subscribers are using broadband than dialup connections[20] as subscribership to high-speed services increased 15% during the first half of 2004.[21] Within the broadband marketplace, the incumbent LECs enjoy market power as either the monopoly or duopoly provider.[22]

In the first half of 2004, ADSL lines in service increased by 20% compared to cable's increase of 13%.[23] Industry analyst Point Topic further found that DSL gained 3.2 million new subscribers in the third quarter of 2004, to reach a total of 12.6 million DSL-enabled phone lines,

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[19] *See e.g., AT&T Corp. v. FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001); Report and Order, Fifth Memorandum Opinion and Order, *1998Biennial Regulatory Review – Review of ARMIS Reporting Requirements*, 14 FCC Rcd. 11443 (1999); *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001).

[20] *See* "Broadband passes dial-up in U.S." Eric Auchard (citing Neilsen/Net ratings report that concludes 51% of U.S. residential users connect to the Internet via broadband links), found at www.msnbc.msn.com/id/57509681.

[21] *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004* – Table 1: High Speed Lines (rel. December 22, 2004).

[22] As of June 30, 2004, ADSL and cable accounted for 92.4% of all high-speed lines in the U.S. and accounted for 97.4% of all high speed lines in the residential and small business market. *Id.* at Table 1 and Table 3: Residential and Small Business High-Speed Lines.

[23] *Id.*

raising DSL's overall broadband market share by 3.8%.[24] Through the third quarter of 2004, DSL and cable are considered "neck-and-neck" in the United States for consumers added.[25]

Additional evidence from the Pew Internet and American Life Project confirms that "DSL now has a 42% share of the home broadband market" compared with cable's 54% share.[26] Because many homes have not been loop-qualified for DSL, due to distance, line impairments, or the presence of Digital Loop Carrier systems between the subscriber and the wire center, the actual Total Available Market for DSL services has been substantially limited. Expanding deployment of DSL at remote terminals served by loop carrier systems has raised the loop qualification percentage over the past five years. Given the current growth numbers, it is likely that DSL may well now have, or may soon have, a higher market share than cable modems among homes that are actually able to get DSL service.

Jupiter Research estimates that by 2008 the U.S. should have a 50% broadband penetration, in which DSL will narrow the 2-to-1 adoption gap, reaching more than 20%, compared to cable modem's nearly 25% share. Jupiter figured DSL lines accounted for 6.7% of total U.S. Internet accessibility in 2003, with cable modem representing 14.4 percent. The divide narrows incrementally until it finally reaches just over 4.5% points in 2008.[27] Recent data released by the FCC indicate that this gap will be closed even sooner.[28]

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[24] Report found at www.point-topic.com; *see also*, http://blog.tmcnet.com/blog/tom-keating/voip/voip-blog/dsl-statistics.asp

[25] DSL Forum and Point Topic Report: *Sharing the broadband market: DSL pulls ahead*, DSL Forum, December 2004, attached as Exhibit A.

[26] Pew Internet Project Data Memo, at 2 (April 2004): *see* http://pewinternet.org/reports.asp?Report=120&Section=ReportLevel1&Field=Level1ID&ID=505

[27] DSL Leads Globally – US Gap Narrowing - *The global broadband connection of choice is expected to catch up to the cable modem in the U.S.*, Robyn Greenspan, CyberAtlas (November 23, 2003), found at http://isp-planet.com/research/2003/dsl_031126.html

[28] *See generally, FCC High Speed Services for Internet Access Services: Status as of June 30, 2004.*

In fact, in some markets, incumbent LEC ADSL already lead cable in the broadband market share.[29] Many of these markets, including California, Montana, North Dakota and South Dakota, are within Qwest's territory.[30]

Perhaps most significant is the fact that of the total number of ADSL lines, **incumbent LECs (including Qwest) have a 95% market share**[31] and overwhelmingly control last-mile transmission facilities used to provide DSL service.[32] And, even with all the "robust" competition Qwest suggests exists, approximately 14% of all American consumers are presently *capable* of being served by just one last mile broadband provider.[33]

Thus, as the above statistics unequivocally show, while cable companies may (for the time being) have slightly more market power than ILECs, it does not mean Qwest, or any ILEC, is in any way "lacking" market power. Nor do the statistics justify either scaling back or abandoning the current regulatory framework.

Thus, today, there are two primary methods competing to provide broadband Internet access, DSL offered by the incumbent LECs and cable modem service, offered by the cable television industry. It is agreed that the cable and telephone industries are very different, with a different history, different capital structure, different network architectures, and, for better or for worse, subject to different laws. This paradigm does not, however, justify the requested

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[29] *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004,* Table 7 – High Speed Lines by Technology as of June 30, 2003.

[30] *Id.* (Note, confidentiality concerns precluded the FCC from providing data on cable's subscribership in several states within Qwest's territory, thus, there very well may be additional markets where Qwest's ADSL market share is greater than cable).

[31] *Id.* at Table 5: High-Speed Lines by Type of Provider as of June 30, 2004.

[32] ILECs provision approximately 92% of all loops and receive approximately 88% of all revenues of local service providers in the US. *FCC Statistics of Communications Common Carriers*, Table 5.1 – Total USF Loops for all Local Exchange Companies; Table 5.13 – Gross Revenues Reported by Type of Carrier (rel. March 2, 2004).

[33] *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004,* Table 12 – Percentage of Zip Codes with High-Speed Lines in Service (this number does not include the almost 6% of Americans that are not served by any broadband provider).

forbearance. Telephone companies should not be turned into cable companies. Qwest certainly likes to cite the alleged similarities of the two networks, but they are fundamentally different – from the way they were developed to the way they operate.

Cable companies did not build their networks based on the guaranteed profits of a regulated monopoly that has existed and been filling the coffers of the ILECs for nearly a century and a half. Cable companies' profits have not benefited from rate-of-return regulation. Cable companies have never been totally free from competitive alternatives such as over the air broadcasting and multichannel satellite services. For the first decades of the cable industry's existence its market penetration never exceeded 40-50% versus the typical 96% penetration of the phone industry. Given the success of cable today, it is fair to question whether cable should be immune from open access requirements. The questions surrounding the proper role of cable for the future is not a reasoned basis to allow ILECs to foreclose the markets, in which they are dominant, to competitive and diverse providers.

Cable modem networks were developed by companies whose primary business was entertainment. They saw the Internet taking away eyeballs from television and saw themselves as able to provide a competitive Internet service. Assuming that the Commission's position in the pending *Brand X*[34] case prevails at the U.S. Supreme Court, cable modem services can be easily described as self-provisioned ISPs. That is 180 degrees different from the model that the telecommunications industry has long used in which they provisioned the bandwidth for ***any*** type of user. Cable systems were developed as closed systems. The telephone network was developed differently. The difference between open and closed networks and the need to retain and extend such openness is evident in the development of the Internet. It is the telephone

[34] *Brand X Internet Services v. FCC,* 345 F.3d 1120 (9th Cir. 2003), *cert. granted,* __ U.S. __, 2004 WL 2153536 (Dec. 3, 2004).

network, not the cable network that permitted the innovation and growth of the commercial Internet in the first place. The Internet is not done growing, technology has not reached its end point, and innovative entrepreneurs stand at the ready to continue the development so long as the tools they need are not taken away from them. Taking any action that deprives or limits access to Qwest's network or even limits the number of ISPs that are able to buy and use naked transmission facilities will eventually lead to the creation of a closed telephone network. Granting Qwest's requested forbearance is the first step down this slippery slope.

If the Commission does grant ILECs their wish to become cable companies, this nation will be left with the primary communications access networks closed – closed to entrepreneurs and closed to innovation. Inevitably, the incredible technological developments witnessed over the past 30 years resulting from open networks will slow to a crawl and eventually dry up.

2. A Duopoly with Cable Does Not Provide Sufficient Price Discipline in the Wholesale DSL Market.

A duopoly partnership, such as that of the ILECs and cable companies, does not provide sufficient price discipline like one that results from a robustly competitive market. "In a duopoly, … supracompetitive pricing at monopolistic levels is a danger."[35] Undoubtedly, without the tariffing safeguards, heightened anti-competitive marketplace pricing is a certainty. This is particularly true here because Qwest utterly (and intentionally) ignores the real world impact its requested retail pricing flexibility will have on its wholesale DSL customers.

Qwest, which admittedly is the second largest competitor for retail broadband services, just so happens to be the primary (and in most instances, the only) wholesale supplier of competitive broadband access throughout its massive territory.[36] Its mass-market DSL service provides its subscribers with a broad choice of ISPs, something not provided by either its

[35] *FTC v. H.J. Heintz,* 246 F.3d 708, 724 (D.C. Cir. 2001).
[36] *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004.*